(6)

No. 88-1775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARY E. PEEL,

Petitioner,

—v.—

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF PETITIONER

BURT NEUBORNE
(*Counsel of Record*)
40 Washington Square South
New York, New York 10012
(212) 998-6172

Attorney for A.N.A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1775

GARY E. PEEL,

Petitioner,

—v.—

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF PETITIONER

---

1. The Association of National Advertisers, Inc. (A.N.A.) moves the Court for leave to file the within brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief. Respondent has declined to grant consent.

2. In support of its motion, A.N.A. avers:

(a) A.N.A. is an organization devoted to the advancement of truthful, non-deceptive advertising as a means of fostering the capacity of individual Americans to make informed and autonomous choices concerning lawful economic options open to them.

(b) A.N.A.'s members place more than 80% of all national and regional advertising in the United States.

(c) A.N.A. believes that government's role in the regulation of commercial advertising is to assist consumers in receiving truthful, non-deceptive information relevant to the making of informed and autonomous market choices.

(d) A.N.A. believes that where, as here, well-meaning government officials place overbroad restrictions on the flow of truthful information of assistance to consumers, the inevitable result is the stifling of competition and the deprivation of the consumer's First Amendment right to know.

(e) While certain potentially misleading assertions by lawyers concerning the quality of legal services may, given the unique status of the legal profession, be legitimately regulated, no basis exists to ban truthful, objective and verifiable information concerning a lawyer's qualifications to perform specific legal tasks requiring special expertise.

(f) Since respondent's prophylactic approach to regulating speech of significant value to consumers appears at variance with the prior decisions of the Court affording First Amendment protection to truthful commercial speech, A.N.A. moves for leave to file the within brief *amicus curiae* in the hope that it will aid the Court in its analysis.

Dated: New York, NY
August 28, 1989

/s/ BURT NEUBORNE

Burt Neuborne
40 Washington Square South
New York, NY 10012
(212) 998-6172

Attorney for Association of National Advertisers, Inc.

QUESTIONS PRESENTED

1. Is the truthful recitation by a lawyer on his professional letterhead that he has been certified as a civil trial specialist by the National Board of Trial Advocacy "commercial" speech in the absence of any showing that the recitation was intended, or perceived, as a solicitation of business?

2. May the truthful recitation by a lawyer that he has been certified as a civil trial specialist by the National Board of Trial Advocacy be labelled as misleading by the Illinois Attorney Registration and Disciplinary Commission in the absence of any factual basis for the Commission's so-called finding?

3. May the Illinois Attorney Registration and Disciplinary Commission prohibit a lawyer from truthfully reciting the objective, verifiable fact that he has been certified as a civil trial specialist pursuant to the rigorous standards of the National Board of Trial Advocacy merely because other lawyers or groups might make potentially misleading assertions concerning the quality of legal services?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
THE FIRST AMENDMENT PRECLUDES ILLINOIS FROM IMPOSING A BLANKET PROHIBITION ON A LAWYER'S ABILITY TO RECITE ON HIS PROFESSIONAL LETTERHEAD THE TRUTHFUL FACT THAT HE HAS BEEN CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY	2
A. Introductory Statement	2
B. In the Factual Context of this Case, Petitioner's Recital of a Significant Professional Achievement on His Professional Letterhead Is Not "Commercial" Speech Because It Did Not Propose a Commercial Transaction	4
C. Illinois Has Made No Attempt to Establish a Factual Basis For Its So-Called Finding That Petitioner's Speech is Misleading	7

	PAGE
D. Respondent May Not Ban All Statements Concerning the Quality of Legal Services, Including Truthful, Objective and Verifiable Statements of Fact, Merely Because Certain Subjective, Non-Verifiable Assertions Concerning Quality May Be Misleading	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: PAGE

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 3, 8, 9

Bigelow v. Virginia, 421 U.S. 809 (1975)..... 3

Board of Trustees of the State University v. Fox, ____ U.S. ____, 57 USLW 5015 (1989) 3, 5, 9

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 3

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984).. 8

Brandenburg v. Ohio, 395 U.S. 444 (1969)..... 8

Buckley v. Valeo, 424 U.S. 1 (1976)..... 5

Cantwell v. Connecticut, 310 U.S. 296 (1940) 5

Carey v. Population Services Int'l., 431 U.S. 678 (1977) 3

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S 557 (1980) 3

Consolidated Edison Co. v. Public Service Comm'n., 447 U.S. 530, 540 (1980)..... 8

DeBartolo Corp., v. Florida Gulf Coast Bldg. & Constr. Trades Council, ____ U.S. ____, 108 S.Ct. 1392 (1988) 3

Ex parte Howell, 487 So. 2d 848 (Ala. 1986) 12

Federal Trade Comm'n v. Colgate Palmolive Co., 380 U.S. 374 (1965)..... 9

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 5

PAGE

Friedman v. Rogers, 440 U.S. 1 (1979) 3

In re Johnson, 341 N.W. 2d 282 (Minn. 1983) 12

In re RMJ, 455 U.S. 191 (1982) 3, 5, 8, 9, 10

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977)..... 3

Lowe v. SEC, 472 U.S. 181 (1985)..... 3

Murdock v. Pennsylvania, 319 U.S. 105 (1943)..... 5

National Socialist Party v. Skokie, 432 U.S. 43 (1977) . 3

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)... 8

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) . 4

New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) 8

Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978) . 3

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) 8

Pickering v. Board of Education, 391 U.S. 563 (1968).. 8

Posadas de Puerto Rico v. Tourism Co., 478 U.S. 328 (1986) 3

Riley v. National Federation of the Blind of North Carolina, 108 S.Ct. 2667 (1988)..... 5

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981). 4

Shapero v. Kentucky Bar Ass'n, 108 S.Ct. 1916 (1988).....3, 9, 11

Smith v. California, 361 U.S. 147 (1959) 5

Tinker v. Des Moines School District, 393 U.S. 503 (1969) 8

PAGE

Valentine v. Chrestensen, 316 U.S. 52 (1942)..... 2

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)..... 3

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)..... 2

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 3, 8, 9, 10

Other Authorities:

Webster's New International Dictionary, 2d.ed..... 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1775

GARY E. PEEL,

Petitioner,

—v.—

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.

Interest of *Amicus Curiae*

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

Statement of the Case

Amicus adopts the statement of the case set forth in the brief for petitioner.

Summary of Argument

Illinois' attempt to censor petitioner's speech violates the First Amendment for three reasons. First, since the speech in question did not propose a commercial transaction, it does not fall within the narrow category of "commercial" speech.

Rather, it is entitled to plenary free speech protection because it transmits information of significant interest to the public at large and is more akin to self-affirming speech than to a solicitation of business.

Second, viewed as "commercial" speech, petitioner's recital cannot be deemed misleading, since it is factually accurate and respondent has made no attempt to satisfy its heavy evidentiary burden of proving that petitioner's speech actually misleads. Conclusory assertions that factually accurate speech is misleading cannot justify governmental censorship.

Third, at least three obvious techniques exist for Illinois to protect consumers against misleading assertions concerning the quality of legal services without banning petitioner's speech. A combination of the use of disclaimers, the prohibition of misleading assertions and the regulation of accrediting organizations would satisfy Illinois' interests without depriving consumers of valuable information. Accordingly, the use of a blanket, overbroad prohibition violates the First Amendment.

Argument

THE FIRST AMENDMENT PRECLUDES ILLINOIS FROM IMPOSING A BLANKET PROHIBITION ON A LAWYER'S ABILITY TO RECITE ON HIS PROFESSIONAL LETTERHEAD THE TRUTHFUL FACT THAT HE HAS BEEN CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY

A. Introductory Statement

Until 1975, a structural divide in First Amendment theory provided effective protection to speech about religion, science, politics and art; but virtually no protection to speech in an economic context. Compare *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) with *Valentine v. Chrestensen*, 316 U.S. 52 (1942). During the past 15 years, the Court has partially bridged the structural divide between "political" and "economic" speech by affording speech about

consumer affairs significant First Amendment protection[1] and by suggesting the existence of First Amendment constraints in the areas of labor relations and capital formation.[2]

The Court's modern "economic" speech cases reflect a recognition that the uncensored flow of information is as important to the proper functioning of a free market economy as it is to the success of a political democracy. Since both systems depend upon the informed choices of free men and women, the functional integrity of each requires a free flow of information to both voters and consumers.

The Court has, however, continued to recognize a distinction between classic "political" speech and speech that proposes a commercial transaction. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 n. 5 (1980). For example, while obnoxious political ideas receive plenary First Amendment protection whether or not we deem them true, false or misleading "commercial" speech is entitled to no constitutional protection because it is of no help to the consumer in making an informed market choice. Compare *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) with *Bates v. State Bar of Arizona*, 433 U.S. 350, 385 (1977) and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S 557, 563 n. 6 (1980).

---

1 Eg. *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services Int'l.*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *In re RMJ*, 455 U.S. 191 (1982); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328 (1986); *Shapero v. Kentucky Bar Ass'n*, 108 S.Ct. 1916 (1988); *Board of Trustees of the State University v. Fox*, _____ U.S. _____, 57 USLW 5015 (1989).

2 *Lowe v. SEC*, 472 U.S. 181 (1985); *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, _____ U.S. _____, 108 S.Ct. 1392 (1988).

Illinois' attempt to forbid attorneys from truthfully reciting on their professional letterheads that they have satisfied the rigorous standards for certification as a civil trial specialist by the National Board of Trial Advocacy (NBTA) raises three significant issues in the context of the Court's economic speech cases: First, is a professional letterhead directed to colleagues and existing clients that truthfully recites a significant professional achievement "commercial" speech at all? Second, if petitioner's letterhead is to be measured under the standards governing the commercial speech doctrine, has Illinois carried its significant factual burden of proving that the speech is actually false or misleading? Third, if the broad category of speech used by petitioner—a statement of professional qualification—is potentially capable of including false and misleading assertions, may Illinois impose a prophylactic ban on the entire category of speech, even though obvious methods exist to separate truthful, objectively verifiable information that is helpful to consumers from assertions that risk misleading them?

B. In the Factual Context of this Case, Petitioner's Recital of a Significant Professional Achievement On His Business Letterhead Is Not "Commercial" Speech Because It Did Not "Propose a Commercial Transaction".

Where, as here, the recital of petitioner's professional achievement was neither designed as a solicitation of business, nor was likely to have been perceived as such by a recipient, the communication does not fall under the narrow, less protected category of "commercial" speech. Rather, it is an example of the type of self-affirming speech that qualifies for the highest level of First Amendment protection. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

The Court has repeatedly recognized that speech may not be deemed "commercial" merely because it takes place in an economic context. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Thus, newspaper advertisements discussing public issues are entitled to plenary First Amendment protection. Corporate speech discussing public issues of concern to the corporation's economic health is entitled to full First Amendment protection.

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). The selling of books, newspapers and magazines at a profit is fully protected by the First Amendment. Eg. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Smith v. California*, 361 U.S. 147 (1959). The solicitation and contribution of funds to charitable and political organizations receives First Amendment protection. Eg. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Riley v. National Federation of the Blind of North Carolina*, 108 S.Ct. 2667 (1988).

Under the Court's cases, the touchstone of "commercial" speech cannot be the fact that it takes place in an economic context, or that it may have economic consequences for the speaker. Rather, "commercial" speech should be confined to the actual proposal of a commercial transaction. *Board of Trustees of the State University v. Fox*, ____ U.S. ____, 57 USLW 5015, 5019 (1989). When, as here: (1) a speaker does not propose a commercial transaction; (2) the content of the message is of significant informational value to the general public; and (3) the hearers' interests are broader than deciding whether to undertake a discrete commercial transaction, the speech can no longer properly be characterized as "commercial" and subjected to a lesser degree of constitutional protection.

Petitioner's interest in reciting his NBTA certification on his professional letterhead was not the solicitation of new business. While the same message delivered in the context of a communication directed to the consuming public would constitute an invitation to trade[3], the colleagues and existing clients who were the recipients of petitioner's professional letterheads were not prospective customers. They were already either professional colleagues or clients. Accordingly, the speech in this case is more akin to a proud recital of a professional achievement than it is to a solicitation to engage in a commercial transaction.

Petitioner has every right to be proud of his certification as a civil trial specialist by the National Board of Trial Advocacy. The rigorous standards applied by the NBTA and the relatively few lawyers who qualify for certification, render petitioner's

3 *In re RMJ*, 455 U.S. 191 (1982).

achievement a mark of professional distinction, similar to an academic honor, a Bar Association award, a recognition of community service or a position of public trust. The natural tendency of any person, professional or not, is to inform colleagues and acquaintances of such personal and professional achievements, not because they translate into commercial advantage, but because they form the matrix of pride and aspiration that is the hallmark of a society based on civic virtue and hard work.

The widespread practice of displaying diplomas, bar admissions, professional awards and public service testimonials prominently in lawyers' offices is witness to the human desire to recite the personal and professional achievements of which we are most proud. If petitioner had prominently displayed his NBTA certification on the wall of his office, presumably not even the long arm of the Illinois Attorney Registration and Disciplinary Commission would have bothered him. The result should not be different because he recited his achievement on his professional letterhead in the context of routine professional communications to colleagues and existing clients.

Moreover, wholly apart from any commercial considerations, the content of petitioner's message is of significant informational value both to specific hearers and to the general public. The quality of legal services is of critical importance to American society. Traditionally, American lawyers have operated as generalists, with each lawyer holding him or herself out to the general public as qualified to perform virtually every legal task. Whatever the wisdom of maintaining the generalist *status quo*, and whatever the very real problems involved in regulating assertions of quality by lawyers, the existence of reputable private organizations like NBTA capable of developing and applying rigorous criteria to measure the expertise of lawyers in given areas of practice is of obvious importance to the general public in deciding whether to modify the *status quo*. Bluntly put, nothing serves the *status quo* in any setting so well as censorship that prevents the public from learning of potential alternatives.

When, as here, government seeks to censor truthful speech that does not propose a commercial transaction, but that involves: (1) a speaker's affirmation of pride in a significant achievement; (2) a message that is corrosive of the *status quo*; and (3) a hearer's interest in obtaining relevant information, government may not characterize the speech as "commercial" in order to induce a lower threshhold of constitutional protection. Rather, government must satisfy the onerous preconditions to censorship imposed by plenary First Amendment protection. Not even respondent claims that such a burden can be met.

C. Illinois Has Made No Attempt to Establish a Factual Basis for Its Unsupported Assertion That Petitioner's Letterhead is Actually Misleading

The attempt to brand as misleading petitioner's recital that he has been certified as a civil trial specialist by the National Board of Trial Advocacy suffers from an acute embarrassment—the statement is completely truthful and accurately reflects the fact that petitioner has satisfied exacting criteria established by a nationally respected organization devoted to improving the quality of advocacy in the Nation's courts. Faced with the factual accuracy of petitioner's recital and with the exacting nature of NBTA's criteria, Illinois argues, first, that the word "certified" as used on petitioner's letterhead is misleading because it connotes an official state imprimatur; and, second, that the word "specialist" may imply an unduly high level of competence. Neither argument can withstand scrutiny.

Petitioner's professional letterhead recites that he has been "certified" as a civil trial specialist by the National Board of Trial Advocacy, not the State of Illinois. No hint of State endorsement occurs in the message. It can hardly be contended that the word "certified" has acquired such a strong secondary meaning that it inevitably suggests government approval. After all, "certified" checks are not government checks and not one of the dictionary definitions of the term even suggests government approval. *Webster's New International Dictionary*, 2d.ed., p. 441.

Given the obvious semantic weakness of respondent's attempt to equate "certified" with "governmentally approved", Illinois must demonstrate a factual basis for its assertion that it is inherently misleading to use the word "certified" in the context of a private group. When, as here, First Amendment rights are at issue, government *ipse dixit* cannot substitute for a factual record. In each context in which the issue has arisen, the Court has been careful to require a would-be governmental censor to prove—not assume—the factual predicate for censorship. Eg. *Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. 530, 540 (1980); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). See also *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

Respondent made absolutely no effort to develop a factual record to support its assertion that the use of the word "certified" would cause hearers to believe that petitioner had received a State imprimatur. Not a single recipient of petitioner's letterhead was asked whether he or she had been misled. Nor did respondent adduce any other factual support for its position. Indeed, the only support in the record for respondent's attempt to brand petitioner's speech as misleading is respondent's conclusory assertion that it is misleading. Such a circular process cannot possibly establish a basis for censorship.

Since the very existence of constitutional protection for commercial speech turns on its truthful character, the Court has refused to allow the commercial speech doctrine to be eroded by the conclusory use of a "misleading" label. Eg. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) ("legal clinic" not misleading; "very reasonable" not misleading; failure to state that name change could be obtained *pro se* not misleading; price advertising for routine legal services not inherently misleading); *In re RMJ*, 455 U.S. 191 (1982) (description of practice not misleading; recital of states of licensure not misleading); *Zauderer*

v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (accurate general legal advice not misleading; use of accurate illustrations not misleading; accurate recitation that had handled similar cases not misleading). Only when a statement is factually inaccurate or incomplete has the Court deemed it misleading. Eg. *Federal Trade Comm'n v. Colgate Palmolive Co.*, 380 U.S. 374 (1965) (simulated T.V. experiments misleading); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (failure to disclose potential personal liability for costs misleading). Measured by such a common-sense standard, Illinois has not provided any support for its attempt to brand petitioner's use of the word "certified" as misleading.

Respondent's argument that the word "specialist" is misleading is even weaker. Once again, respondent has not even attempted to build a factual record in support of its assertion. In fact, as with the term "legal clinic" in *Bates*, the term "specialist" conveys a rough meaning that is of clear assistance to a potential consumer. Of course, were an unqualified or insufficiently experienced lawyer to use the phrase, it would be misleading. But where, as here, an experienced litigator recites that a nationally respected association of lawyers and judges has deemed him qualified to call himself a civil trial "specialist", that information, if deemed commercial speech at all, can only assist consumers in making an informed choice.

D. Respondent May Not Ban Truthful, Objective and Verifiable Statements of Fact Concerning the Quality of Legal Services Merely Because Subjective, Non-Verifiable Assertions of Quality May Be Misleading

Ordinarily, advertising is designed to inform consumers about three things: availability, price and quality. In the context of advertising by lawyers, the Court has recognized that the First Amendment protects truthful advertising of the price and availability of legal services, but has been reluctant to accord constitutional protection to subjective, non-verifiable assertions as to quality. *Bates v. State Bar of Arizona*, 433 U.S. 350, 366 (1977); *In re RMJ*, 455 U.S. 191, 201 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 640 n. 9 (1985);

Shapero v. Kentucky Bar Ass'n, 108 S.Ct. 1916 (1988). Unlike most commercial settings, in which consumers are able to assess the quality of a service, the complexity of legal practice renders it difficult for a consumer to evaluate certain subjective, non-verifiable assertions concerning the quality of legal representation. Accordingly, the Court has expressed concern over the prospect of misleading statements and a degradation of the legal profession.

Assuming *arguendo* that the Court's concerns would justify a refusal to permit advertisements by lawyers containing potentially misleading assertions as to the quality of legal representation, the issue posed by this case is whether a prophylactic ban on objective and verifiable factual statements similar to petitioner's violates the First Amendment.

In *Board of Trustees of the State University v. Fox*, ____ U.S. ____, 57 USLW 5015 (1989), the Court reaffirmed the four part test governing commercial speech set forth in *Central Hudson*. Under the fourth prong of the *Central Hudson* test as applied in *Fox*, a censor may not ban truthful commercial speech if obvious alternatives exist that protect the State's interest without resorting to censorship. While *Fox* made clear that the search for a less drastic alternative to censorship was not to be mechanistically transformed into an insistence upon the least drastic means, *Fox* reiterated the Court's longstanding refusal to tolerate "substantially excessive" attempts at censorship. 57 USLW at 5018. For example, in *In re RMJ*, 455 U.S. 191, 203 (1982), the Court noted:

> . . . the States may not place an absolute prohibition on certain types of potentially misleading information, eg. a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

Similarly, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court refused to approve prophylactic bans on general legal advice and illustrations in lawyer's advertising merely because each was capable of being abused. Instead, the Court held:

> Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. 471 U.S. at 646.

See also *Shapero v. Kentucky Bar Ass'n.*, 108 S.Ct. 1916 (1988).

In this case, three obvious methods exist to permit Illinois to deal with potentially misleading speech without interfering with the free flow of truthful speech.

First, the Court has repeatedly noted that regulators of attorney advertising remain free to require disclaimers or additional disclosures if necessary to prevent a misleading statement. Eg., *In re RMJ*, *supra*; *Zauderer v. Office of Disciplinary Counsel*, *supra*.

Second, the Court has indicated that given the unique status of the legal profession, regulators may distinguish between certain subjective, non-verifiable assertions as to the quality of legal services and objective, verifiable statements of fact. Respondent has offered no evidence or authority of any kind to explain why it is necessary to ban facts in order to deal with misleading assertions. In *Zauderer*, the Court responded to an identical attempt to ban all illustrations from lawyer's advertisements:

> The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorney's advertising cannot be combated by any means short of a blanket ban.
>
> * * *
>
> We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alter-

native of a blanket ban on the use of illustrations. 471 U.S. at 649.

Finally, regulators remain free to set standards and to establish procedures to assure the trustworthiness of any private accrediting agency. Indeed, that is precisely what the Supreme Courts of Alabama and Minnesota did when confronted with this issue. *In re Johnson*, 341 N.W. 2d 282 (Minn. 1983); *Ex parte Howell*, 487 So. 2d 848 (Ala. 1986). Illinois stands alone in having adopted a policy of prophylactic censorship.

Fox makes it clear that the burden rests squarely on Illinois to explain why a combination of disclaimer, prohibition of misleading assertions and regulation of accrediting groups is not sufficient. 57 USLW at 5018. It is a burden that Illinois has not even attempted to carry. Accordingly, since Illinois has not "presented a convincing case for its argument that the rule . . . is necessary to the achievement of a substantial governmental interest", its attempt at prophylactic censorship must fail. 471 U.S. at 644.

Conclusion

For the above-stated reasons, the decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

Dated: August 28, 1989
New York, New York

Burt Neuborne*
40 Washington Square
New York, New York 10012
(212) 998-6172

Counsel for A.N.A.

**Counsel of Record*